LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAY 14 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 1208

B. R. SHEFFIELD, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

ABE FORTAS
STUART J. LAND
1229 - 19th Street, N. W.
Washington 6, D. C.

HUME COFER
JOHN D. COFER
1408 Capital National Bank Building
Austin 1, Texas

Attorneys for Petitioner

WILLIAM B. MARTIN
of Hillsboro, Texas

BEN GEESLIN
of Brady, Texas

DOUGLASS D. HEARNE
of Austin, Texas

Of Counsel

May 14, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	9
1. The Affirmance of Petitioner's Conviction on the Basis of a Charge for Which He Was Never Tried	9
2. Petitioner's Unfair Exposure to Double Jeopardy	12
3. Petitioner's Right to Hearing on Application for Probation	15
Conclusion	18
Appendix A	1a
Appendix B	13a
Appendix C	17a

TABLE OF AUTHORITIES

CASES:

Bartkus v. Illinois, 359 U.S. 129 (1959)	14
Betts v. State, 60 Tex. Crim. 631, 133 S.W. 251 (1911)	13
Black v. State, 143 Tex. Crim. 318, 158 S.W. 2d 795 (1942)	13
Chessman v. Teets, 354 U.S. 156 (1957)	18
Ciucci v. Illinois, 356 U.S. 571 (1958)	14
Cole v. Arkansas, 333 U.S. 196 (1948)	9, 12
De Jonge v. Oregon, 299 U.S. 353 (1937)	9
Douglas v. California, ... U.S. ...., 9 L. Ed. 2d 811 (1963)	15, 17, 18
Downum v. United States, ... U.S. ...., 31 Law Week (Sup. Ct. Ed.) 4369 (decided April 22, 1963)	14
Fay v. Noia, ... U.S. ...., 9 L. Ed. 2d 837 (1963)	16
Garner v. Louisiana, 368 U.S. 157 (1961)	9
Gideon v. Wainwright, ... U.S. ...., 9 L. Ed. 2d 799 (1963)	15

	Page
Green v. United States, 355 U.S. 184 (1957)	14
Green v. United States, 365 U.S. 301 (1961)	17
Hoag v. New Jersey, 356 U.S. 464 (1958)	14, 15
Mapp v. Ohio, 367 U.S. 643 (1961)	15
Palko v. Connecticut, 302 U.S. 319 (1937)	13, 14
Parish v. State, 145 Tex. Crim. 117, 165 S.W. 2d 748 (1942)	12
Petite v. United States, 361 U.S. 529 (1960)	14
Powell v. Alabama, 287 U.S. 45 (1932)	16
Sealfon v. United States, 332 U.S. 575 (1948)	14
Sheffield v. State of Texas, 165 Tex. Crim. 354, 307 S.W. 2d 100 (1957)	2, 7
State v. Klein, 154 Tex. Crim. 31, 224 S.W. 2d 256 (1949)	16
Thompson v. Louisville, 362 U.S. 199 (1960)	9
Townsend v. Burke, 304 U.S. 736 (1948)	16
United States v. Oppenheimer, 242 U.S. 85 (1916)	14
Van Hook v. United States, 365 U.S. 609 (1961)	16, 17
Williams v. New York, 337 U.S. 241 (1949)	17
Williams v. Oklahoma, 358 U.S. 576 (1959)	17
Yates v. United States, 354 U.S. 298 (1957)	14

CONSTITUTIONS:

United States Constitution, Fifth Amendment	14
United States Constitution, Fourteenth Amendment	2, 3, 7, 8, 12, 13, 14, 15, 16, 17, 18
Texas Constitution, Article I, Section 14	3, 13

STATUTES:

18 U.S.C. § 3651	16
28 U.S.C. § 1257(3)	2
Texas Code of Criminal Procedure, Article 781d	3, 8, 16
Texas Penal Code, Chapter 2, Title 14	3, 10
Article 1007	4, 5, 6, 10
Article 1008	4
Article 1010	10

MISCELLANEOUS:

Supreme Court Rules, Rule 19(a)	16
Federal Rules of Criminal Procedure, Rule 32(a)	16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

B. R. SHEFFIELD, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner, B. R. Sheffield, prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Texas entered in the above-entitled case, and the denial of petitioner's second motion for rehearing, dated February 13, 1963.

OPINIONS BELOW

The opinions of the court below are not yet reported and are printed herein in Appendix A. The original opinion of the court of October 3, 1962, affirming petitioner's conviction is printed at pp. 1a-8a, *infra*; the court's opinion of January 9, 1963, overruling petitioner's first motion for rehearing is printed at pp. 8a-11a,

infra. Petitioner's second motion for rehearing was denied without opinion on February 13, 1963 (see p. 12a, *infra*). Also noted is the opinion of the Court of Criminal Appeals of April 24, 1957, reversing petitioner's conviction under a prior indictment based on the same transactions, reported at 165 Tex. Crim. 354, 307 S.W. 2d 100 (1957).

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on October 3, 1962. Petitioner's second motion for rehearing was denied February 13, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the Court of Criminal Appeals denied petitioner due process under the Fourteenth Amendment of the United States Constitution by sustaining petitioner's conviction on the basis of a finding that petitioner had committed an offense for which he was never tried below, and which, in fact, had been abandoned by the State in two separate trials.

2. Whether such a finding by the Court of Criminal Appeals violated the Due Process Clause of the Fourteenth Amendment by unfairly exposing petitioner to double jeopardy for an offense for which he had been acquitted twice.

3. Whether, consistent with the Due Process Clause of the Fourteenth Amendment, a state court in a criminal proceeding can deny a defendant an opportunity to present evidence in support of an application for probation and suspension of a sentence of confinement imposed by a jury.

STATUTES INVOLVED

The statutes involved are Articles 1006-1011, comprising Chapter 2 of Title 14 of the Texas Penal Code, which covers offenses involving forged instruments affecting land documents; Section 3 of the Texas Adult Probation and Parole Law of 1957, Article 781d of the Texas Code of Criminal Procedure; Article I, Section 14 of the Texas Constitution prohibiting double jeopardy; and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The pertinent provisions of the Texas statutes and Texas Constitution involved herein are set out in Appendix B.

STATEMENT OF THE CASE

In the trial below, petitioner was indicted on two counts under Chapter 2 of Title 14 of the Texas Penal Code. The first count charged that petitioner, with intent to defraud, committed forgery by aiding, encouraging and procuring the forgery of an acknowledgment of an instrument relating to land by a notary public, Doris Sayles (R.I. 1-8).[1] The second count charged that petitioner, with intent to defraud, knowingly passed this forged acknowledgment to the Texas Veterans' Land Board (R.I. 8-15). Petitioner pleaded not guilty to both counts. As hereinafter noted, the

---

[1] The record filed with the Supreme Court is in three parts and is referred to herein as follows:

"R.I.—" refers to that portion of the record containing the pertinent motions, opinions and other papers filed in the proceeding below and in petitioner's first trial.

"R.II—" refers to the copies of petitioner's briefs below submitted herein.

"R.III.—" refers to the 9-volume transcript of evidence presented at petitioner's trial below.

first count was not submitted to the jury; however, petitioner was convicted below under the second count of passing a forged instrument in violation of Article 1008 of the Code. The jury imposed on petitioner a sentence of 6 years in the state penitentiary.

The forged acknowledgment which petitioner was convicted of passing was a part of an application personally signed by a Texas Korean War veteran, A. G. Mireles, to the Texas Veterans' Land Board for about $7,000 to purchase 200 acres of farm land allegedly owned by petitioner and his associates. Pursuant to the procedure provided under the Texas Veterans' Land Law, the Board purchased the land and in turn transferred it to the veteran under a long-term loan.

The acknowledgment in issue provided that the applicant Mireles had personally appeared before the notary public, Doris Sayles, and acknowledged the signing of the application. The State charged that the acknowledgment was a forgery on the following grounds:

(i) It was false because, as the Texas Court of Criminal Appeals found, although Mireles actually signed the application, he did not personally appear before Mrs. Sayles (Appendix A, p. 2a, *infra*). It was similarly found that she had also signed and certified the acknowledgment at a later time but outside of Mireles' presence (*id.* at p. 3a, *infra*).

(ii) The false acknowledgment, the State charged, constituted a forgery by reason of Article 1007 of the Texas Penal Code. This section provides that any person, authorized to take proof of acknowledgment, who "willfully and falsely" certifies that an acknowledgment relating to title of land was duly made is guilty of forgery. It is important to note that the trial

court specifically instructed the jury that to convict petitioner of passing a forged instrument, it was required to find that the notary public, Mrs. Sayles, had committed the forgery of this acknowledgment. See p. 11, *infra*.

At petitioner's trial, the State prosecution sought to show that the applicant Mireles in fact did not wish to purchase the land in question, but had signed the application upon payment of $100 by an alleged accomplice of the petitioner. The State also sought to show that Mireles' application, together with applications of other veterans procured by the same means and covering other parcels of farm land allegedly owned by petitioner and his associates, were submitted by accomplices of petitioner to the Texas Veterans' Land Board and that the Board paid petitioner and his associates inflated prices for the land. Petitioner, a contractor who had no prior criminal record, took the stand and denied the State's charges.

Petitioner bases this petition on the following events occurring during the course of the proceedings below:

First: The Court of Criminal Appeals of Texas, in reviewing petitioner's conviction, upheld the judgment of the trial court on a finding that petitioner, rather than Mrs. Sayles, committed the forgery of the acknowledgment in question. However, this charge had never been submitted to the jury below, and petitioner in fact had been twice acquitted of this offense inasmuch as the charge had been abandoned in two proceedings against petitioner, including the trial below.

Specifically, on the appeal, petitioner contended that there was no forgery of the acknowledgment within the meaning of Article 1007. Petitioner argued that the

record showed that there had been no forgery of the signatures on the application or on the acknowledgment, and that the notary public, Doris Sayles, in making the acknowledgment lacked an intent to defraud as required to establish a forgery under Article 1007; indeed, the record showed that she had no knowledge of the alleged illegal scheme of petitioner involving the Texas Veterans' Land Board. The Court of Criminal Appeals, in its original opinion, however, rejected this contention on the ground that no intent to defraud was required to establish the commission of forgery under Article 1007.

Petitioner, in his first motion for rehearing, then cited the Texas authorities demonstrating that a fraudulent intent was an essential element of the offense under Article 1007. The Court of Criminal Appeals issued a second opinion overruling petitioner's motion. In answer to petitioner's citation of authorities, the court set forth a wholly new basis to support its conclusion that the acknowledgment had been forged as charged. Specifically, it found that, without regard to Doris Sayles' intent in making the false acknowledgment, the evidence was sufficient to establish that petitioner possessed a fraudulent intent and that he was a principal in the commission of the alleged forgery offense. As the court found (Appendix A, pp. 9a-10a, *infra*):

> "It is strenuously re-urged that the evidence is insufficient to support the conviction on the ground that there is no showing that Doris Sayles, the notary, had any fraudulent intent when she certified that Mireles had appeared before her in the making of the acknowledgment.
>
> "In addition to the disposition made of this contention in the original opinion, it is further concluded that without regard to whether Doris Sayles innocently, or while acting as a principal,

certified that Mireles appeared before her as a notary, the evidence is sufficient to warrant the finding that the appellant had the intent to defraud and was a principal in the commission of the offense charged."

At the first opportunity, in his second motion for rehearing, petitioner raised the issue of the serious deprivation of due process under the Fourteenth Amendment committed by the Court of Criminal Appeals in sustaining petitioner's conviction on the basis of a finding that petitioner had perpetrated a forgery. As petitioner noted below, such a finding (a) deprived petitioner of a fair trial and of his right to trial by jury, and (b) also unfairly exposed him to double jeopardy. See Appendix C, pp. 17a-18a, *infra*. This was true because petitioner had not been tried below for the forgery offense and had been previously acquitted of the charge under controlling Texas law.

In fact, the trial court had refrained from submitting the first count of the indictment to the jury; this charged petitioner with committing the very offense found by the Court of Criminal Appeals. Moreover, in petitioner's prior trial, the State had expressly elected to abandon a virtually identical count involving the same offense. (See R.I. 194.)[1] Under Texas law, such abandonment of a charge constitutes an acquittal. Consequently, petitioner stood twice acquitted of forgery. Nevertheless, the Court of Criminal Appeals sustained his conviction by holding him guilty of the same charge.

[1] At this trial, petitioner was convicted of passing a forged instrument. However, this conviction was reversed by the Court of Appeals because of an evidentiary deficiency and other errors not pertinent here. *See Sheffield v. Texas*, 165 Tex. Crim. 354, 307 S.W. 2d 100 (1957).

Second: Petitioner was refused an opportunity by the trial court to present evidence on his application for probation. After the jury imposed its sentence of confinement on petitioner, he filed an application with the trial court for probation and suspension of the sentence pursuant to Article 781d of the Texas Code of Criminal Procedure. This provision permits the court to grant such an application when "the ends of justice and the best interest of the public and defendant will be subserved thereby . . ." In furtherance of this application, petitioner proffered evidence which showed, among other things, that he was in poor health, and that the State would recover in full all of its funds allegedly paid over to petitioner, plus an additional profit of $30,000 by reason of the increased value of the land in issue. (See R.I. 119-123.)

The trial court, however, refused to afford petitioner a hearing. The court ruled that in view of petitioner's conviction, it had no "patience" with the application and rejected it summarily (R.I. 132a). It accordingly rejected petitioner's application without considering petitioner's proffered evidence. In fact, in the bill of exceptions filed with the Court of Criminal Appeals, the trial court took note that it "specifically does not certify that any of the proffered facts are in fact true but that they are [petitioner's] contentions". (R.I. 132e).

Petitioner duly excepted to the trial court's ruling. On appeal to the Court of Criminal Appeals, he specifically raised the issue that this refusal contravened petitioner's rights under the Due Process Clause of the Fourteenth Amendment. (See Appendix C, pp. 17a-18a, *infra*.) The Court of Criminal Appeals, however, sustained the trial court's decision on the ground

that the grant of probation was discretionary with that court. (See Appendix A, p. 7a, *infra*.)

REASONS FOR GRANTING THE WRIT

1. The Affirmance of Petitioner's Conviction on the Basis of a Charge for Which He Was Never Tried

In *Cole* v. *Arkansas*, 333 U.S. 196, 200 (1948), this Court upheld the contention virtually identical to the point advanced below by petitioner herein, that "to sustain a conviction on grounds . . . which the jury had no opportunity to pass upon deprives the defendants of a fair trial and a trial by jury, and denies the defendants the due process guaranteed by the Fourteenth Amendment to the United States Constitution." As the Court specifically ruled in *Cole* v. *Arkansas*, (333 U.S. at 201):

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made . . ."

This Court has repeatedly applied this fundamental principle in condemning efforts by state appellate courts to overcome serious evidentiary deficiencies and other errors in trial court proceedings by upholding convictions on the basis of charges not in fact tried below. E.g., *Cole* v. *Arkansas*, *supra*; *Garner* v. *Louisiana*, 368 U.S. 157, 164 (1961); *Thompson* v. *Louisville*, 362 U.S. 199, 206 (1960); *De Jonge* v. *Oregon*, 299 U.S. 353 (1937). As the Court held in *De Jonge* v. *Oregon*, *supra*, 299 U.S. at 362: "Conviction upon a charge not made would be sheer denial of due process."

In this case, in an effort to uphold petitioner's conviction despite a serious deficiency in an essential ele-

ment of proof, the Court of Criminal Appeals similarly deviated from the standards of due process established by the cited decisions. Thus, under the indictment, the State was required to prove that the acknowledgment which petitioner allegedly passed to the Texas Veterans' Land Board was actually forged. However, as already noted, it was established that there was no forgery of any signatures on the application or on the accompanying acknowledgment. Moreover, the testimony of the notary public, Doris Sayles, who appeared as a State witness, plainly revealed that she had no intent to defraud in making the acknowledgment outside of the applicant's presence. (See R.III. 593-651.) To sustain the conviction, despite this lack of evidence, the Court of Criminal Appeals was impelled to find that petitioner was guilty of the charge, never tried below, that he was a principal in the forgery. Under the decisions of this Court cited above, this was clearly a "sheer denial of due process."

There can be no question that petitioner's conviction was ultimately sustained on this finding. The second opinion was rendered in response to petitioner's motion for rehearing containing citations of Texas authorities which overwhelmingly establish that a fraudulent intent is necessary to make a forged acknowledgment in violation of Article 1007 of the Texas Penal Code. (See Amended Motion for Rehearing, Etc., R.II. pp. 3-9).[1]

---

[1] For example, Article 1010, in dealing with the requirements of proof under Chapter 2 of Title 14 of the Texas Penal Code, which includes Article 1007, refers repeatedly to the necessity for establishing a "fraudulent intervention" and an "intent to defraud" under all of the articles in Chapter 2, without qualification. See Appendix B, pp. 14a-15a, *infra*.

Although the Court declined to withdraw its initial opinion on this point, it felt constrained to issue another opinion holding that petitioner was guilty of the untried forgery charge. The inference is accordingly warranted that the Court recognized the infirmity of its original opinion and required a different ground for affirming petitioner's conviction—namely, the determination that he had committed the offense of forgery which had never been tried; otherwise the addition of this determination was superfluous. In any event, petitioner was deprived of due process by reason of the appellate court's action in convicting him of a criminal charge which he had no opportunity to contest.

There is no doubt that this determination by the Court of Criminal Appeals was based on an untried charge. The instructions show that the only forgery issue submitted to the jury was whether Doris Sayles—not petitioner—had forged the instrument. The trial court's instruction on the forgery issue was this:

> "You are instructed that *before you can convict the defendant of knowingly passing a forged instrument in this cause*, you must find and believe beyond a reasonable doubt that the *acknowledgment of Alfonso G. Mireles* to the application and contract of sale submitted to the Veterans' Land Board *was in fact willfully forged by Doris Sayles*, meaning by the term 'willfully', that such action was taken with evil intent or legal malice, or without reasonable grounds to believe the act to be lawful, and that the defendant passed the acknowledgment of Alfonso G. Mireles to the Veterans' Land Board. . . ." (Emphasis supplied) (R. I. 43)

The trial court refrained altogether from submitting to the jury the first count of the indictment which alleged that petitioner was a principal in the commis-

sion of the forgery by Doris Sayles, the very charge on which he now stands convicted, not by a jury, but by the Texas Court of Criminal Appeals. Moreover, as also noted, in petitioner's first trial, the State had expressly abandoned the count and elected not to submit it to the jury. (See R.I. 194.) As we hereafter show, petitioner accordingly stood twice acquitted of this offense. There was clearly no justifiable ground, under any concept of due process, supporting the Court of Criminal Appeals' decision to sustain petitioner's conviction on this basis. As this Court also held in *Cole v. Arkansas*, *supra* (333 U.S. at 201):

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."

It follows that petitioner's conviction plainly constitutes a serious and intolerable deviation from established principles of due process of law within the meaning of the Fourteenth Amendment.

2. Petitioner's Unfair Exposure to Double Jeopardy

The affirmance of petitioner's conviction on the basis of the forgery charge violated the double jeopardy prohibitions embodied in the Due Process Clause of the Fourteenth Amendment. It is beyond question that under Texas law, petitioner stood *twice acquitted* of the offense of forgery. The Texas authorities are overwhelmingly clear that this is the meaning and effect both of the failure of the trial court below to submit the first count charging this offense and of the prosecution's election to abandon the same count at petitioner's

prior trial; e.g., *Black* v. *State*, 143 Tex. Crim. 318, 158 S.W. 2d 795 (1942); *Parish* v. *State*, 145 Tex. Crim. 117, 165 S.W. 2d 748 (1942); *Betts* v. *State*, 60 Tex. Crim. 631, 133 S.W. 251, 254 (1911). As the Texas Court of Criminal Appeals stated in *Black* v. *State*, *supra* (158 S.W. 2d at 795):

> "At the former trial hereof, it was shown that after appellant had pleaded not guilty to both counts herein, the trial court withdrew from the consideration of the jury count no. 2 . . . and only submitted to the jury count no. 1. . . . The dismissal of such count no. 2 after a plea of not guilty has been entered amounted to an acquittal of such count no. 2.
>
> "In 12 Tex. Jur., Sec. 245, p. 564, it is stated 'where a defendant has been tried on several counts and convicted under one, he is thereby acquitted of the others and may not later be tried upon the ones for which he was so acquitted.'"

Having been so acquitted, petitioner could not be tried again for the offense of forgery under Texas law. See Texas Constitution, Article 1, Section 14. However, the Court of Criminal Appeals below, without benefit even of trial, has held petitioner guilty of this offense and used this holding as a basis for sustaining his conviction. Petitioner was accordingly the victim of constitutionally prohibited double jeopardy.

In this connection, we submit that this case presents an appropriate and timely opportunity for the Court to consider the proper scope of protection afforded by the Due Process Clause of the Fourteenth Amendment against a state's contravention of the principles of double jeopardy. In *Palko* v. *Connecticut*, 302 U.S. 319, 328 (1937), this Court held that the Fourteenth Amendment did not embody the double jeopardy pro-

visions of the Fifth Amendment; further, that the Fourteenth Amendment inhibited state action imposing double jeopardy only when the accused was subjected to "a hardship so acute and shocking that our policy will not endure it," or when it violated "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (302 U.S. at 328).

In contrast, however, for purposes of federal criminal proceedings, the Court has stringently enforced the double jeopardy restraints under the Fifth Amendment. See, e.g., *Green* v. *United States*, 355 U.S. 184 (1957); *Downum* v. *United States*, — U.S. —, reported at 31 Law Week (Sup. Ct. Ed.) 4369 (decided April 22, 1963); cf. *Petite* v. *United States*, 361 U.S. 529 (1960). This has included the absolute prohibition of a subsequent prosecution of a defendant based on any matters encompassed by a prior acquittal of the defendant, even where the subsequent prosecution involves a different offense. See, e.g., *Sealfon* v. *United States*, 332 U.S. 575 (1948); cf., *Yates* v. *United States*, 354 U.S. 298, 336 (1957); *United States* v. *Oppenheimer*, 242 U.S. 85 (1916). The standards of these cases would clearly condemn the ruling of the Court of Criminal Appeals in this case that petitioner was guilty of the offense of forgery.

The rule of the *Palko* case, that the Fourteenth Amendment affords a limited protection against the imposition of double jeopardy by the states, has been upheld in this Court by the narrowest majorities. See *Hoag* v. *New Jersey*, 356 U.S. 464 (1958) (5-3 decision); *Ciucci* v. *Illinois*, 356 U.S. 571 (1958) (5-4 decision); cf. *Barthus* v. *Illinois*, 359 U.S. 129 (1959) (5-4 decision). As Justice Douglas stated in his dis-

sent, concurred in by Justice Black, in *Hoag* v. *New Jersey*, 356 U.S. 464, 477 (1958):

> "We recently stated in Green v. United States, 355 U.S. 184, that by virtue of the constitutional protection against double jeopardy an accused can be forced to 'run the gantlet' but once on a charge. That case, involving a federal prosecution, provides for me the standard for every state prosecution as well, and by that standard this judgment of conviction should be reversed."

With increasing frequency, this Court has found that in many areas of criminal procedure, the constitutional requirements applicable to federal and state proceedings involve the same considerations of fundamental justice and require the application of the same standards. See, e.g., *Gideon* v. *Wainwright*, — U.S. —, 9 L. Ed. 2d 799 (1963); *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Cf., *Douglas* v. *California*, — U.S. —, 9 L. Ed. 2d 811, 814-15 (1963). It is no less essential that the court re-evaluate the differences in the constitutional treatment of double jeopardy principles in federal and state proceedings, and adopt more uniform standards. This case presents an appropriate opportunity for such a re-evaluation and should accordingly be reviewed by this Court.

3. Petitioner's Right to Hearing on Application for Probation

The final question relates to the refusal of the trial court to grant petitioner an opportunity to present evidence in support of his application for probation and suspension of the sentence imposed under Texas procedure by the jury.

So far as we know, this Court has never decided the issue whether the Due Process Clause of the Four-

teenth Amendment entitles a defendant to such a hearing. We submit, however, that the refusal of the State to recognize this right is not in accordance with the basic concepts of fair procedure recognized by this Court as guaranteed under the Fourteenth Amendment, and that review is accordingly warranted. See Rule 19(a), Supreme Court Rules. The Court has frequently noted that "the scope of due process [under the Fourteenth Amendment] . . . comprehends . . . the right to be heard." (See, e.g., *Fay* v. *Noia*, — U.S. —, 9 L. Ed. 2d 837, 862 (1963).) As the Court noted in *Powell* v. *Alabama*, 287 U.S. 45, 68 (1932):

> "'. . . an opportunity of being heard is . . . among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard. . . .'"

And this "right to be heard" plainly applies to the sentencing stage of a criminal proceeding, which involves a critical issue of a defendant's liberty or confinement. Cf., *Townsend* v. *Burke*, 304 U.S. 736 (1948).

The Texas Probation Law has been interpreted to be in all essential respects the same as the Federal Probation Statute, 18 U.S.C. § 3651. See *State* v. *Klein*, 154 Tex. Crim. 31, 224 S.W. 2d 250 (1949). Under federal procedure, the defendant is specifically provided under Rule 32(a) of the Federal Rules of Criminal Procedure, with "an opportunity to make a statement on his own behalf *and to present any information in mitigation of punishment*." (Emphasis supplied) The Court has regarded the opportunity afforded under Rule 32(a) to be of such importance that it has reversed a conviction and required resentencing where the defendant has been denied an opportunity to make a statement before sentencing. See *Van Hook*

v. *United States*, 365 U.S. 609 (1961); cf., *Green* v. *United States*, 365 U.S. 301 (1961). The federal practice is, we submit, a reflection of rudimentary safeguards which should be held applicable under the Fourteenth Amendment to state proceedings, safeguards which plainly require that petitioner be permitted an opportunity to present evidence on behalf of an application for probation.

The Court has held that the state courts are afforded a wide discretion in the sources and types of information which they may rely upon in sentencing an accused. See *Williams* v. *New York*, 337 U.S. 241 (1949); *Williams* v. *Oklahoma*, 358 U.S. 576 (1959). However, these decisions were expressly grounded on the availability to the accused of an opportunity to present evidence in mitigation. Thus, in *Williams* v. *Oklahoma*, *supra*, in upholding the defendant's sentence on the basis of information outside the record of the proceedings, the Court specifically noted (358 U.S. at 583):

> "It is not contended that petitioner requested or suggested that the trial court hear evidence in mitigation of the sentence. . . . In these circumstances, we cannot say that petitioner was deprived of any right or of fundamental fairness by the fact that the court did not pursue the presentencing procedures prescribed by the Oklahoma statutes."

See also, *Williams* v. *New York*, *supra*, 337 U.S. at 244.

In contrast, here an opportunity to present evidence in mitigation to the court was denied petitioner. It is fundamental to criminal justice that an accused be permitted to present evidence and to have an opportunity to persuade the court to accept his position, regardless of a court's inclination to regard his cause as unmeritorious. Cf., *Douglas* v. *California*, — U.S.

—, 9 L. Ed. 2d 811 (1963); *Chessman* v. *Teets*, 354 U.S. 156 (1957).

The case accordingly warrants review by this Court on an important issue of procedure under the Due Process Clause. It presents an appropriate and timely opportunity for the Court to consider the guarantees afforded to defendants under the Fourteenth Amendment in the sentencing stage of a state criminal proceeding.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to the Court of Criminal Appeals of Texas.

Respectfully submitted.

ABE FORTAS
STUART J. LAND
1229 - 19th Street, N. W.
Washington 6, D. C.

HUME COFER
JOHN D. COFER
1408 Capital National
Bank Building
Austin 1, Texas

Attorneys for Petitioner

WILLIAM B. MARTIN
of Hillsboro, Texas

BEN GEESLIN
of Brady, Texas

DOUGLASS D. HEARNE
of Austin, Texas

Of Counsel

May 14, 1963

APPENDIX A

Opinions Below

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 34,232

B. R. SHEFFIELD, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Hill County

Opinion

Appellant was convicted of the offense of uttering and passing a forged instrument in writing relating to and affecting title to land. His punishment was assessed at confinement in the penitentiary for a term of six years.

Trial was had in the District Court of Hill County, Texas, after a change of venue from the District Court of Travis County, Texas. The cause was heretofore reversed by this court in Sheffield v. State, 307 S.W. 2d 100, because the evidence was insufficient to show that the notary public taking the acknowledgment to the instrument alleged to be false was a duly qualified notary public, and for other reasons set forth in the opinion.

The statutes, Arts. 1006, 1007, and 1008 of the Penal Code, under which appellant was convicted, were held constitutional in the opinion.

Attention being directed to the amendment of Art. 5412m, V.A.C.S., in 1955, by the addition of Sec. 32 prescribing a penalty for the use of any false, fictitious, or forged instrument in writing in connection with or pertaining to any transaction under the Veterans Land Fund Act, the court gave application to the penalty prescribed in said section, the section being enacted by the legislature subsequent to the date of the offense charged against appellant and

prescribing a lesser penalty than that prescribed in Art. 1006, supra.

We find no merit in appellant's contention that in enacting Sec. 32 of Art. 5421m, supra, the legislature repealed Art. 1008, supra. A contrary intention was clearly expressed in Sec. 14 of the later act wherein it was provided that the provisions of the act were to be cumulative of all other laws not in conflict therewith.

The record in this case is perhaps one of the longest with which this court has been confronted. It contains some 3,800 pages. After carefully reviewing the entire record, we find that appellant's primary contention is that the evidence is insufficient to support the conviction. It is his contention that the evidence fails to show that the acknowledgment, as set out in the indictment, was "falsely made" by the notary, Doris Sayles, or that it was made with any fraudulent intent.

Briefly summarizing the testimony, it reflects that the appellant had been engaged in what is known as "block deals" under the Veterans Land Program of this state at Brady, Texas. Appellant and L. V. Ruffin secured applications from qualified veterans, paid them $100 each for the rights under the Veterans Land Program, submitted the application to the Veterans Land Office at Austin, Texas, purchasing the land on the sworn application of these various veterans without the veterans appearing before a notary public to swear to the applications pertaining to the acquisition of the land. The conviction in this cause was had on the transaction involving a veteran by the name of Alfonso G. Mireles. Mireles was a veteran living at Brady, Texas. He went to the office of L. V. Ruffin and signed an application. He testified that he did not read it, that he did not appear before Doris Sayles, that he never talked to her, that he did not want to buy any land, that he had never been in Kinney County, Texas, where the land involved in this transaction is located, that some nine months later he signed

some papers for Mr. Ruffin, that Ruffin gave him a check for $100, that the final contract was acknowledged by Jerrie Rankin but he did not appear before Jerrie Rankin and did not know her.

The testimony of Doris Sayles, substantiated by a copy of the commission from the Secretary of State, adequately reflects that she was a notary public. She testified that Mireles did not appear before her but the acknowledgment reflects that she certified that he did.

The evidence adduced from the testimony of Doris Sayles and Mireles clearly shows that the acknowledgment was falsely made.

Art. 1007, V.A.P.C., which was the applicable statute at the time of the commission of the offense, provides that if any person authorized by law to take the proof of an acknowledgment to any instrument, document, or paper whatsoever, affecting or relating to the title of lands in this state, wilfully and falsely certifies to such proof or acknowledgment duly made, he shall be guilty of forgery. We hold that this article does not require any intent to defraud upon the part of the notary making a false certificate to an acknowledgment. We think the wilful making of a false acknowledgment is a forgery under the terms of the article. Appellant's contention is without merit.

Appellant further contends that the facts and circumstances are not sufficient to show that he was a principal and that there is no evidence that he uttered personally, published, passed, or used the alleged false or forged acknowledgment.

We think it unnecessary to here review the lengthy testimony as to the scheme or system used by appellant, Ruffin, and Bascom Giles in this and other transactions involving the purchase of large blocks or tracts of land and the division of the excess profits from the inflated values with intent to defraud. Suffice it to say that the testimony is more than adequate to establish the appellant as a prin-

cipal in this transaction. Ruffin's testimony shows that appellant knew the applications of the various veterans were in blank. Ruffin testified that he secured more than 100 veterans' signatures to applications, approximately 54 of them being used in this transaction, and that the Rosenow Ranch involved in this transaction was in Kinney County, and Mireles was to get his tract of land out of it. Ruffin's testimony further reflects that appellant suggested that they make different tracts so that it would look better; that appellant got the money from Brady National Bank; that appellant was to pay Ruffin some $20,000 but that appellant said he had to pay Giles $75,000 and that he reduced the amount that Ruffin was to receive.

Appellant testified that Ruffin laid the papers involving the Rosenow Ranch on his desk and talked to appellant's wife and said he wanted Doris to do some work for him; that Doris came in and asked where the papers were and appellant pointed them out to her; that he did not take the applications to Austin; that he did not know the law required the person making the acknowledgment to be present; and that such was not the practice in Brady, Texas.

The testimony of Doris Sayles, who was Mrs. Grover C. Cunningham at the time of this trial, reflects that appellant asked her to come to his office on many occasions in reference to notarizing the applications of veterans and that none of the veterans were ever before her when the acknowledgments were completed. She further testified that when she read of the investigations of the Veterans Land scandals and talked to the appellant that he informed her he would tell them he was responsible.

Appellant's testimony shows that he borrowed the money to make the down payments for the 34 veterans on the Rosenow tract; and that he had quite a few dealings with Bascom Giles, who was the Commissioner of the General Land Office and also shown to be the Chairman of the Veterans Land Board in the State of Texas.

The state's testimony amply reflects many telephone calls from Brady made by the appellant and Ruffin to Giles at Austin and, in turn, numerous calls were made by Giles to appellant at Brady during the time of this and other transactions. The testimony of the state further reflects that the 10,000 acre Rosenow Ranch was purchased by appellant and others for $16 per acre; that the appraiser for the Veterans Land Board first appraised the land at $27 per acre and was later instructed by Bascom Giles to add $5 per acre to the valuation. The state's exhibits show receipts issued to appellant for fifty-four cashier's checks to the Veterans Land Board for the 5% down payment on each loan, plus the fifty-four receipts for cashier's checks for the $50 closing fee on each tract. The state further showed that appellant assigned fifty-one commitments made by the Veterans Land Board to veterans for the land subdivided in the Rosenow Ranch tract to Bankers Life & Casualty Company of Chicago.

While the evidence of Doris Sayles Cunningham and L. V. Ruffin is accomplice testimony, it directly shows that appellant was a principal in this and other transactions. We conclude that the testimony of Mrs. Jerrie Rankin, in addition to the other testimony, is sufficient to corroborate the testimony of these two accomplice witnesses. Cawley v. State, 310 S. W. 2d 340.

The question as to Mireles being an accomplice was submitted to the jury. We do not think the proof shows that he was an accomplice. In our opinion, he was an innocent veteran with little education, looking for an easy one hundred dollar pick up. We hold the evidence sufficient to show appellant to have been a principal throughout the transaction involved. It is unnecessary to corroborate the entire narrative and all of the testimony of an accomplice. Middleton v. State, 217 S. W. 1046. Every constituent element of the offense as testified to by the accomplice need not be corroborated. Williams v. State, 128 S. W. 1120; Shaffer v. State, 52 S. W. 2d 1054. Also, see: Contreras v. State,

162 S. W. 2d 716, which holds that it is not necessary that the corroborating evidence support that of the accomplice to each criminative fact but is sufficient if the corroborating evidence tends to connect the accused with the offense charged.

Appellant strenuously urges by lengthy brief and oral argument that the trial court erred in overruling his objections to the court's charge. The record before us reflects that the trial court filed its first charge at 4:55 p.m. on February 6, 1961, and that the appellant took exceptions and objections to it, embodying some forty-two pages. The court then filed another charge at 9:45 p. m., on February 7, 1961. From this state of the record, it is not entirely clear to us that the appellant excepted and objected to his second or last charge of the court, which was the one read to the jury. We do resolve any doubt in this connection in appellant's favor and adopt his premise that he also made exceptions and objections to the final charge of the court. We do not find, however, that the appellant took exception to the ruling of the court in overruling his exceptions and objections to this charge of the court. In the absence of such exception, appellant's complaint to the charge is not before us for review. Stone v. State, 346 S. W. 2d 323; Eldredge v. State, 284 S. W. 2d 734; Smith v. State, 313 S. W. 2d 291; Redman v. State, 287 S. W. 2d 676; Medlock v. State, 356 S. W. 2d 312. For like reasons, the complaints to the refusal of requested charges are not before us. Medlock v. State, supra, and cases cited.

Appellant next complains that the trial court erred in overruling his motion to quash the indictment. We think this contention is without merit. The indictment in the second count alleged, in substance, that appellant did unlawfully and with the intent to make money and with the intent to defraud, knowingly utter, publish, pass, and use as true and genuine, to the Veterans Land Board of the State of Texas, a certain false and forged acknowledgment to a certain instrument in writing relating to and affecting

title to land, and that when the appellant did utter, publish, pass, and use as true and genuine the said instrument in writing, he well knew that said acknowledgment was false and forged.

The failure to allege how and by whom the acknowledgment was falsely made did not render the indictment insufficient. Uplack v. State, 96 S. W. 2d 979.

Appellant fourthly complains of the action of the trial court in overruling his motion to change venue from Hill County because of local prejudice against him. No affidavits of compurgators in support of the change of venue were filed. A motion for change of venue must be supported by affidavits of at least two compurgators in order to be considered. Philpot v. State, 332 S. W. 2d 323; Methowen v. State, 290 S. W. 2d 521; 77 S. Ct. 1405, 354 U. S. 936; Windham v. State, 288 S. W. 2d 96. This complaint is also without merit.

Appellant's contention that the second count of the indictment shows that it was barred by the three year statute of limitation is without merit. The record shows that the offense was alleged to have been committed on or about the 20th day of May, 1954, and the indictment was returned June 11, 1959. Art. 177, C. C. P. fixes the limitation period for this offense at ten years. By the holding of this court in the first Sheffield case, 307 S. W. 2d 100, the offense here charged is within the forgery offense, and the ten-year statute applies to forgery. The same is true of the offense defined in Art. 54[illegible] Sec. 32, supra. So the offense is not barred.

Lastly, the appellant complains of the action of the trial court in overruling his application for probation. No error is shown. Probation is discretionary with the trial court. McClane v. State, 343 S. W. 2d 447.

We have carefully considered and examined all of the remaining contentions of appellant, along with the numer-

ous informal bills of exception, and find no error reflected in any of them.

Finding the evidence sufficient to sustain the verdict of the jury and finding no reversible error, the judgment is affirmed.

McDONALD, *Judge*

(Delivered October 3, 1962)

---

4. Opinion of the Court of Criminal Appeals of Texas in This Case Upon Rehearing (R. 153-156)

No. 34,232

B. R. SHEFFIELD, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Hill County

Opinion on Appellant's Motion for Rehearing

Appellant contends that the contract of sale and the assignment which is set out and referred to in the indictment as "a certain instrument in writing" relate to the sale of real estate, and are in violation of the provisions of Art. 6137b, V.A.P.C. This statute prohibits any person subdividing real estate from using the subdivision's description in any deed of conveyance or contract of sale delivered to a purchaser unless and until a map or plat has been duly authorized and filed for record with the clerk of the County Court of the county where the real estate is situated. He further contends that the statutory prohibition with a penalty imposed renders the contract of sale and the assignment void. Therefore, the assignment on which this prosecution rests could not be made the basis of forgery and the appellant could not be guilty as charged.

At first attention is directed to the provisions of Art. 1009, V.A.P.C., to the effect that upon indictment under Chapter 2 of Title 14, it shall be no defense that the instrument was in law, either as to substance or form, void.

The first paragraph in the contract of sale consists of an application to purchase real estate from the Veterans Land Board of Texas. The contract is subject, among other conditions, to the commitment of the Board not being below the contract price. Next, the contract is subject to the defects, if any, in the title. The assignment depends on certain terms and conditions, and is also subject to acceptance by the Board.

It is apparent from the contract that it is an executory contract to convey and not such a contract of sale per se as passes either legal or equitable title. The assignment is in the same condition. Currie v. Burgess, 120 S.W. 2d 788; Tashneck v. Hefner, 282 S.W. 2d 298. Art. 1137 h, supra, relates only to deeds and contracts of sale delivered to a purchaser. Therefore, the assignment set out and designated in the indictment as "a certain instrument in writing" is not void because it does not come within the terms of the aforesaid article.

It is insisted that there is a fatal variance between the allegations of the indictment and the proof because the description of the real estate is violative of Art. 1137 h, supra, which renders the contract of sale and its assignment void. This contention is controlled by the holding herein that said article is not applicable to the instruments here in question.

It is strenuously resurged that the evidence is insufficient to support the conviction on the ground that there is no showing that Doris Sayles, the notary, had any fraudulent intent when she certified that Mireles had appeared before her in the making of the acknowledgment.

In addition to the disposition made of this contention in the original opinion, it is further concluded that without

regard to whether Doris Sayles innocently, or while acting as a principal, certified that Mireles appeared before her as a notary, the evidence is sufficient to warrant the finding that the appellant had the intent to defraud and was a principal in the commission of the offense charged.

The motion for rehearing is overruled.

BELCHER, *Judge.*

(Delivered January 9, 1963.)

No. 34,232

B. R. SHEFFIELD, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Hill County

Concurring Opinion on Motion for Rehearing

Appellant's counsel has tendered to this Court as an exhibit to his motion for rehearing a stipulation executed by all the prosecutors involved and joined in by himself in which it is agreed that he did in fact except to the action of the court in overruling his objections and exceptions to the charge and that such exception was, through inadvertence and oversight, omitted from the certificate of the court.

There is no escape from the conclusion that if we considered such stipulation we would in effect be permitting an amendment to a bill of exception long after the statutory time for filing the same has expired and would be overruling a long line of authorities which hold that such may not be done.

In the recent case of Gonzales v. State, 297 S.W. 2d 144, we held that the district clerk was without power to antedate or attempt to file back objections and exceptions to

the court's charge. Therefore we cite Ortiz v. State, 53 S.W. 2d 58, as authority for the rule that this might not be done even with the consent of the trial court. The effect of such holding is that a bill of exception must be perfected under Article 760d, V.A.C.C.P., within 90 days after the giving of notice of appeal, and that once that time has elapsed, no bills filed or perfected thereafter will be considered.

In Tindol v. State, 239 S.W. 2d 396, we said:

> "In this connection attention is directed to the rule that a bill of exception becomes an unamendable instrument once the appeal is perfected and the time for filing such bills has expired, because the trial court is then without jurisdiction to make any order whatsoever in the case. For this Court to allow the filing of amendments or additions to bills in cases on appeal would so complicate and delay the adjudication of a cause of action that this Court might never remain current with its docket. This we must do in order to properly perform our function in the judicial system."

See also Crawford v. State, 305 S.W. 2d 362, and Smith v. State, 313 S.W. 2d 291, and cases there cited.

I join in the overruling of the motion for rehearing.

Morrison, *Judge*.

(Delivered January 9, 1963).

Minutes of Court of Criminal Appeals

AUSTIN, TEXAS

B. R. SHEFFIELD, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Hill County

SECOND MOTION FOR REHEARING OVERRULED WITHOUT WRITTEN OPINION

February 13, 1963:

This cause came on to be heard on Appellant's Second Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that the said motion be and the same is hereby in all things overruled.

APPENDIX B

Statutes

Title 14, Chap. 2, Articles 1006, 1007, 1008, 1010, and 1011, Texas Penal Code 1925:

Article 1006. *Forgery of patents, etc.*

Every person who falsely makes, alters, forges, or counterfeits, or causes or procures to be falsely made, altered, forged, or counterfeited, or in any way aids, assists, advises, or encourages the false making, altering, forging, or counterfeiting of any . . . transfer, assignment, release, conveyance, or title paper, or acknowledgment, or proof of record, . . . in relation to or affecting lands, or any interest in lands in this State, with the intent to make money or other valuable thing thereby . . . or with any fraudulent intent whatever, shall be deemed guilty of forgery and be punished by imprisonment in the State penitentiary at hard labor not less than five nor more than twenty years.

Article 1007. *False certificate by officers*

If any person authorized by law to take the proof of acknowledgment of any instrument, document or paper whatsoever, affecting or relating to the title of lands in this State, wilfully and falsely certify that such proof or acknowledgment was duly made, or if any person fraudulently affixes a fictitious or pretended signature purporting to be that of an officer or any other person, though such person never was an officer or never existed, he shall be deemed guilty of forgery and punished as provided in article 1006 of this chapter.

Article 1008. *Knowingly uttering forged instruments*

Every person who knowingly utters, publishes, passes, or uses, or who in any way aids, assists in or advises the uttering, publishing, passing or using as true and genuine any false, forged, altered or counterfeited . . . acknowledg-

ment or proof for record or certificate of record, belonging to or pertaining to any instrument or paper, or any evidence of any right, title or claim of any character whatsoever . . . in any way relating to, or having any connection with land, or any interest in land in this State, with the intent mentioned in article 1006 of this chapter, or with any other fraudulent intent whatsoever, shall be deemed guilty and be punished in like manner as is provided in article 1006 of this chapter. And the filing or causing or directing to be filed, or causing or directing to be recorded, in the General Land Office of the State, or in any office of record or in any court in this State, or the sending through the mails or by express, or in any other way, for the purpose of filing of record of any such false, altered, forged or counterfeited matter, documents, conveyances, papers, or things, knowing the same to be false, altered, forged or counterfeited, shall be an uttering, publishing and using within the meaning of this article.

Article 1010. *Proof and allegations*

Upon indictment under this chapter, to warrant a conviction, it shall only be necessary to prove that the person charged took any one step, or did any one act or thing in the commission of the offense, if from such step, act or thing any of the intentions hereinbefore mentioned, or any other fraudulent intention, may be reasonably inferred; nor shall it be any defense to a prosecution under this chapter, that the matter, act, deed, instrument or thing was in law, either as to substance or form, void, or that the same was not in fact used for the purpose for which it was made or designed; and it shall only be necessary in an indictment under this chapter to state with reasonable certainty the act constituting the offense, and charge, in connection therewith, in general terms, the intention to defraud, without naming the person or persons it was intended to defraud. On trial of such indictment, it shall be sufficient and shall not be deemed a variance if there

appears to be an intent to defraud the United States, or any State, Territory, county, city, town or village, or any body corporate, or any public officer in his official capacity, or any co-partnership, or member thereof, or any particular person.

Article 1011. *Rules in forgery applicable*

The rules prescribed in the preceding chapter relative to the offense of forgery, so far as the same are applicable, shall apply to the various offenses enumerated in this chapter.

Texas Code of Criminal Procedure,
Article 781d. Article II

Article II. *Probations*

Sec. 2. The courts of the State of Texas having original jurisdiction of felony criminal actions, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby, shall have the power, after conviction or a plea of guilty for any felony, crime or offense except murder, rape, and offenses against morals, decency, and chastity, where the maximum punishment assessed the defendant does not exceed ten years imprisonment, and where the defendant has not been previously convicted of a felony, to suspend the imposition or the execution of sentence and may place the defendant on probation for the maximum period of the sentence imposed or, if no sentence has been imposed, for the maximum period for which the defendant might have been sentenced, or impose a fine applicable to the offense committed and also place the defendant on probation as hereinafter provided. Any such person placed on probation shall be under the supervision of such court.

Constitution of Texas. Article 1.
§ 14. Double Jeopardy

Sec. 14. No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.

APPENDIX C

Excerpt from Petitioner's Brief Below on Appeal to the Court of Criminal Appeals of Texas from the District Court (p. 18)

"Fifth Point of Error

"The Court erred in summarily overruling defendant's application for probation without permitting defendant an opportunity to offer evidence thereon, and particularly in view of the Court's qualification of defendant's Bill of Exception in refusing to certify, without permitting any evidence, that the grounds relied upon by defendant in his motion and in his bill were not certified by the Court as facts, but as merely allegations of the defendant, and in refusing to hear defendant's application for probation as provided by the Acts of 1957, 55th Legislature, p. 466, Ch. 226 (known as Vernon's Code of Criminal Procedure, Article 781d); and in so doing the trial court acted arbitrarily and abused its discretion, and denied defendant a fair hearing under said statute, and denied him due process of law and the equal protection of the law under the Constitutions of the State of Texas and of the United States."

Excerpts from Petitioner's Second Motion for Rehearing Below to the Court of Criminal Appeals of Texas

. . . . . .

"The judgment of this Court which finds the appellant, B. R. Sheffield, a principal in the forgery, without a jury finding to that effect, denies this defendant a trial by jury in a felony case, and denies him the equal protection of the law and due process of law, under the Constitution of Texas, and the Constitution of the United States and Amendments thereto.

"Appellant now at the earliest possible time, when this Court holds, without according him a jury trial, that he is guilty as a principal in the alleged forgery, raises and presents this Federal Question of equal protection of the

law due process, and of his right to have a jury; and not this appellate court, decide the issue as to whether he was a principal in the alleged forgery. (R. I, p. 158)

* * * * *

"The judgment of this Court, for the first time on re-hearing, holding defendant guilty as principal in forging the acknowledgment of Alfonso Mireles to the instrument in writing in this case, places the appellant twice in jeopardy for the same offense, and convicts him of an offense of which he has been heretofore tried and acquitted, and denies him the equal protection of the law, and due process of law under the Constitution of Texas, and the Constitution of the United States, and Amendments thereto.

"Appellant now raises this Federal Question at the first opportunity. (R. I, p. 159)

"5. This Court erred in refusing to reverse this case because of the error of the trial court in refusing to hear and consider appellant's petition for probation. Appellant says that the refusal to hear such application was arbitrary and unreasonable, and denied him equal protection of the law, and due process of law as guaranteed by the Constitution of Texas, and the Constitution of the United States and Amendments thereto, all of which is shown by defendant's Bill of Exceptions No. 10." (*Ibid.*)